Pua Kim Seng v Mohamad Khashim bin Abdul Sakor & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–48 OF 2007
RAUS SHARIF, HASAN LAH AND SULONG MATJERAIE JJCA
21 JANUARY 2010

Trusts and Trustees — Trusts — Construction of trust deed — Whether trust deed contrary to public policy pursuant to s 24(e) of the Contracts Act 1950 — Whether trust deed fell under specific classes of contracts ruled by authority to be contrary to policy of law — Whether trust deed valid and enforceable

This was the appellant's appeal against the High Court's dismissal of the appellant's application for a declaration that the first respondent was holding 20 shares in the second respondent company on trust for the appellant pursuant to a trust deed dated 25 November 2002. The first respondent, together with the appellant and one Lim Aik Chin were all the shareholders and directors of the second respondent company. The second respondent company secured a 30 year lease from Perbadanan Kemajuan Negeri Selangor ('PKNS') of a piece of land ('the land') for the use as site for a petrol kiosk. The second respondent company sub-leased the whole of the 30 year lease to ESSO for it to build and operate upon the land a petrol kiosk in August 2001. By a trust deed dated 25 November 2002 it was stated that the first respondent would hold 20 shares ('the trust shares') out of the 31 shares in the second respondent company on trust for the appellant. However, the first respondent failed to comply with the appellant's demand for the execution of the transfer form in respect of the trust shares in favour of the appellant pursuant to cll 1 and 2 of the trust deed. The High Court held that the trust deed was unenforceable as it contravened article 6 of the second respondent company's article of association. Hence the issue to be determined was whether the trust deed was still valid and enforceable in view of article 6 of the second respondent company's articles of association.

Held, allowing the appellant's appeal with costs here and below:

(1) The learned trial judge erred in law in holding that the trust deed was unenforceable in view of article 6 of the articles of association of the second respondent company. Further, the learned trial judge failed to appreciate the significance and distinguish the effect of that article on the second respondent company as compared with the first respondent. article 6 did not affect the validity of the trust deed as the second respondent was not a party to the trust deed and hence was not bound by the agreement made between the appellant and the first respondent.

Article 6 merely provides protection to the second respondent company so that it would not be bound or required in any way to recognise any equitable, contingent, future or partial interest in the trust shares. As between the appellant and the first respondent the agreement or trust could be enforced (see para 20); *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240 referred.

(2) The first respondent did not adduce any evidence to show that in the lease agreement between the second respondent company and PKNS there was a condition precedent to say that the second respondent company must have a Bumiputra shareholding of 51%. As the averment was made by the first respondent the burden was on the first respondent to prove that there was such a condition. Even if there was such a condition, it had not been shown by the first respondent that such policy was in fact a public policy (see para 22).

(3) There was no merit in the first respondent's contention that the trust deed was void as being contrary to the public policy pursuant to s 24(e) of the Contracts Act 1950. There was no evidence to show that there was such a policy practised by the State Government of Selangor with regard to the land. Also, there was no evidence to show that the policy was in fact a public policy. More importantly it had not been shown that the trust deed was 'incontestably and on any view inimical to the public interest'. On the facts, the trust deed did not fall under any of the specific classes of contracts which had been ruled by the authority to be contrary to the policy of the law (see para 26).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap penolakan Mahkamah Tinggi terhadap permohonan perayu untuk perisytiharan bahawa responden pertama memegang 20 syer di dalam syarikat responden kedua atas amanah untuk perayu berikutan surat ikatan amanah bertarikh 25 November 2002. Responden pertama, bersama dengan perayu dan Lim Aik Chin kesemuanya adalah pemegang-pemegang saham dan pengarah-pengarah syarikat responden kedua. Syarikat responden kedua memperoleh pajakan selama 30 tahun daripada Perbadanan Kemajuan Negeri Selangor ('PKNS') terhadap sekeping tanah ('tanah tersebut') untuk penggunaan sebagai tapak untuk stesen minyak. Syarikat responden kedua memberikan pajakan kecil kesemua pajakan 30 tahun kepada ESSO untuk membina dan menjalankan perniagaan stesen minyak di atas tanah tersebut pada Ogos 2001. Melalui surat ikatan amanah bertarikh 25 November 2002 ia dinyatakan bahawa responden pertama akan memegang 20 syer ('syer amanah tersebut') daripada 31 syer di dalam syarikat responden kedua atas amanah untuk perayu. Walau bagaimanapun, responden pertama gagal untuk mematuhi tuntutan perayu untuk perlaksanaan borang pindah milik berkaitan syer amanah tersebut memihak kepada perayu berikutan klausa-klausa 1 dan 2 surat ikatan amanah

tersebut. Mahkamah Tinggi memutuskan bahawa surat ikatan amanah tersebut tidak boleh dikuatkuasakan kerana ia bertentangan dengan perkara 6 tataurusan persatuan syarikat responden kedua. Maka isu yang perlu ditentukan adalah sama ada surat ikatan amanah tersebut masih sah dan berkuat kuasa berikutan perkara 6 tataurusan persatuan syarikat responden kedua.

Diputuskan, membenarkan rayuan perayu dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Hakim bicara yang bijaksana khilaf dari segi undang-undang dalam memutuskan bahawa surat ikatan amanah tersebut tidak boleh dikuatkuasakan berikutan perkara 6 tataurusan persatuan syarikat responden kedua. Selanjutnya, hakim bicara yang bijaksana gagal untuk menilai kepentingan dan perbezaan kesan perkara tersebut ke atas syarikat responden kedua berbanding responden pertama. Perkara 6 tidak menjejaskan kesahan surat ikatan amanah tersebut kerana responden kedua bukan pihak kepada surat ikatan amanah tersebut dan oleh itu tidak terikat dengan perjanjian yang dibuat di antara perayu dan responden pertama. Perkara 6 hanya memperuntukkan perlindungan kepada syarikat responden kedua supaya ia tidak akan terikat atau dikehendaki secara apapun untuk menerima apa-apa ekuiti, kontinjen, kepentingan masa hadapan atau sebahagian di dalam syer amanah tersebut. Di antara perayu dan responden pertama, perjanjian atau amanah boleh dikuatkuasakan (lihat perenggan 20); *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240 dirujuk.

(2) Responden pertama tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa di dalam perjanjian pajakan di antara syarikat responden kedua dan PKNS terdapat syarat duluan menyatakan bahawa syarikat responden kedua mesti mempunyai pemegangan saham Bumiputra sebanyak 51%. Memandangkan hujahan tersebut dibuat oleh responden pertama, beban adalah ke atas responden pertama untuk membuktikan bahawa terdapat syarat sedemikian. Walaupun terdapat syarat sedemikian, ia tidak ditunjukkan oleh responden pertama bahawa polisi sedemikian sebenarnya polisi awam (lihat perenggan 22).

(3) Tidak terdapat merit di dalam hujahan responden pertama bahawa surat ikatan amanah tidak sah kerana bertentangan dengan polisi awam berikutan s 24(e) Akta Kontrak 1950. Tidak terdapat keterangan untuk menunjukkan bahawa terdapat polisi sedemikian diamalkan oleh Kerajaan Negeri Selangor berkaitan tanah tersebut. Juga, tidak terdapat keterangan untuk menunjukkan bahawa polisi sebenarnya adalah polisi awam. Lebih penting lagi ia tidak ditunjukkan bahawa surat ikatan amanah adalah 'incontestably and on any view inimical to the public

interest'. Atas fakta, surat ikatan amanah tidak terangkum di bawah mana-mana kelas kontrak yang spesifik yang telah diarahkan oleh pihak berkuasa bertentangan dengan polisi undang-undang (lihat perenggan 26).]

Notes

For a case on construction of trust deed, see *Mallal's Digest* (4th Ed, 200 Reissue) para 2592.

Cases referred to

Jin Sen Hong [1971] Sdn Bhd v Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, intervener) [1988] 3 MLJ 101, HC (refd)
Mohamed Yahaya v MS Ally Sdn Bhd & 11 Ors [1985] 1 MLJ 243, HC (refd)
Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143, PC (refd)
Societe Generale de Paris and another, The v The Tramways Union Company, Limited, and others (1884) 14 QBD 424, CA (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253, FC (refd)
UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd [2007] 2 CLJ 665, HC (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(e)

Appeal from: Originating Summons No D3–24–431 of 2005 (High Court, Kuala Lumpur)

Douglas Yee (CJ Siew with him) (Douglas Yee) for the appellant.
TA Sivam (T Ananthasivam) for the first respondent.
Michele Kaur (Jayan & Associates) for the second respondent.

Hasan Lah JCA:

[1] By originating summons dated 15 December 2005 the appellant sought, inter alia, a declaration that the first respondent is holding 20 shares in the second respondent company on trust for the appellant pursuant to a trust deed dated 25 November 2002.

[2] On 12 December 2006 the High Court dismissed the appellant's originating summons with costs. Being dissatisfied with the said decision the appellant then appealed to this court against the decision vide notice of appeal dated 10 January 2007.

[3] On 29 July 2009, we allowed the appellant's appeal. We now give the grounds for our decision.

[4] The relevant facts are as follows. The first respondent, together with the appellant and one Lim Aik Chin are all the shareholders and directors of the second respondent company. Their respective shareholdings in the second respondent company as on 30 November 2004 are as follows:

	Number of Shares held
Pua Kim Seng (the appellant)	49
Lim Aik Chin	20
Mohammad Khashim bin Sakor	31 (the first respondent)
Total	100

[5] The first respondent became a shareholder of the second respondent company in early April 2001.

[6] The second respondent company secured a 30-year lease from Perbadanan Kemajuan Negeri Selangor ('PKNS') of a piece of land known as Plot L, Jalan Aerobic, Seksyen 13, Shah Alam, Selangor ('the land') for the use as site for a petrol kiosk.

[7] In consideration of a rental of RM6,250,000 the second respondent company sub-leased the whole of the 30-year lease to ESSO for it to build and operate upon the land a petrol kiosk in August 2001.

[8] By a trust deed dated 25 November 2002 it was stated that the first respondent would hold 20 shares ('the trust shares') out of the 31 shares in the second respondent company on trust for the appellant.

[9] By cl 1 of the trust deed the first respondent agreed, among others, to transfer, pay and deal with the trust shares and the dividends and interests payable thereon in such manner the appellant shall from time to time direct.

[10] By cl 2 of the trust deed, the first respondent agreed to transfer or cause to be transferred to the appellant all the trust shares at the appellant's verbal or written request.

[11] The appellant had, through his solicitor's letter dated 25 November 2005, demanded that the first respondent execute the transfer form in respect of the trust shares in favour of the appellant pursuant to cll 1 and 2 of the trust deed. The first respondent failed to comply with the appellant's demand.

[12] In dismissing the appellant's application the learned judicial commissioner held that the trust deed was unenforceable because it contravened article 6 of the second respondent company's articles of association which provides that:

> No person shall be recognized by the Company as holding any shares upon any trust, and the Company shall not be bound by or required in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entity thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of court.

[13] As such, one of the issues for determination before us was whether the trust deed is still valid and enforceable in view of article 6 of the second respondent company's articles of association.

[14] It was the contention of the appellant that article 6 does not in any way affect or invalidate the trust deed between the appellant and the first respondent. It merely relieves the second respondent company from being obliged to recognise the appellant's equitable interest in the trust shares. In support of that learned counsel for the appellant cited the following cases:

(a) *Jin Sen Hong [1971] Sdn Bhd v Khiing Sie Khuo (Syarikat Kion Hoong Cooking Oil Mills Sdn Bhd, intervener)* [1988] 3 MLJ 101;

(b) *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240;

(c) *The Societe Generale de Paris and another v The Tramways Union Company, Limited, and others* (1884) 14 QBD 424.

[15] With regard to the issue whether the trust deed is tainted with illegality the appellant submitted that there was no evidence to support that averment. The lease agreement between PKNS and the second respondent company was not exhibited to show that there was such condition in the lease agreement. It was not shown that there was such a public policy with regard to the 51% of the Bumiputra shareholding in a company like the second respondent company.

[16] Learned counsel for the first respondent submitted that the trust shares were never registered with the second respondent company as such. As far as the second respondent company was concerned the first respondent was the registered legal and beneficial owner of all the 31 shares and the second respondent company was bound by article 6 of its articles of association.

[17] Secondly, and we think this was the main argument of the first respondent before us, the first respondent contended that the trust deed was a design by the appellant to deceive PKNS because in the lease agreement of the land between the second respondent company and PKNS there was a condition precedent that the second respondent company must have a Bumiputra shareholding of 51%. The effect of transferring the 20 shares to the appellant would give the appellant a 69% shareholding in the second respondent company. It was therefore submitted that the trust deed was illegal and void under s 24 of the Contracts Act 1950. In support of his submission learned counsel for the first respondent cited the following cases:

(a) *Mohamed Yahaya v MS Ally Sdn Bhd & 11 Ors* [1985] 1 MLJ 243,

(b) *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143,

(c) *UNP Plywood Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2007] 2 CLJ 665.

[18] We now deal with the first issue by referring to the decision of the Federal Court in *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240. In that case the respondent claimed that he had lent moneys to the first defendant and that the moneys have not been repaid by the latter nor by the appellant company nor have they transferred or issued the shares to him. The action was brought both against the first defendant and the appellant company. The appellant company applied for the writ to be set aside and the statement of claim to be struck out on the ground, inter alia, that they disclosed no reasonable or probable cause of action. The learned judge dismissed the application of the appellant company. The Federal Court allowed the appeal by the appellant company and held that the appellant company was not a party to any of the transactions between the respondent and the first defendant and the source of the funds for payment of the shares had nothing to do with the appellant company. The statement of claim against the appellant company was struck out and the action against it dismissed. At p 242 the Federal Court, through Abdoolcader J (as he then was) said:

> A company does not take cognisance of trusts except in so far as is provided for in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognise any equitable interest or any other right in a share except an absolute right in the registered holder. This goes beyond s 163 in so far as it relates not merely to the question of registration of the membership right but generally to the recognition of trusts in connection with shares. Now article 10 of the appellant's articles of association which goes beyond the provisions of s 163(4) of the Companies Act expressly stipulates that except as required by law, no person shall be recognised by it as holding any share upon any trust, and it shall not be bound by or be compelled in any way to recognise (even

when having notice thereof) any equitable, contingent, future or partial interest in any share or unit of a share or (except only as by its articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirely thereof in the registered holder. The cestui que trust of shares in a company cannot be made liable either as a shareholder or as a contributory for there is no privity of contract between him and the company (*Cree v Somervail*(1)). In *Re Perkins, ex parte Mexican Santa Barbara Mining Company*(2) (at p 616), Lord Coleridge CJ said:

> In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do: they can look only to the man whose name is upon the register.

It is therefore of no concern of or to the appellant whether or not the first defendant holds any of the 2,399,999 shares registered in its name in the appellant on trust for the respondent or any one else.

[19] In *The Societe Generale de Paris and another v The Tramways Union Company, Limited, and others* (1884) 14 QBD 424 at pp 451 and 452, Lindley CJ made the following observation:

> If a shareholder in a company governed by the Companies Act 1862, does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it. As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains shareholder still. He is the person to exercise the rights of a shareholder, — for example, to vote as such, to receive dividends as such, and to transfer the shares. On the other hand, he, and he alone, is liable for calls and to be put on the list of contributories if the company is wound up. The person having the beneficial interest in the shares has, as against the company, no right to them; he has as against the company no right to have them registered in his own name.

[20] We were thus satisfied that the learned trial judge erred in law in holding that the trust deed was unenforceable in view of article 6 of the articles of association of the second respondent company. We agreed with the submission of learned counsel for the appellant that the learned trial judge failed to appreciate the significance and distinguish the effect of that article on the second respondent company as compared with the first respondent. We were of the view that article 6 did not affect the validity of the trust deed. The second respondent was not a party to the trust deed and it was not

bound by the agreement made between the appellant and the first respondent. The trust deed was of no concern of the second respondent company. Article 6 merely provides protection to the second respondent company so that it would not be bound or required in any way to recognise any equitable, contingent, future or partial interest in the trust shares. As between the appellant and the first respondent the agreement or trust could be enforced.

[21] On the second issue, s 24(e) of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy.

[22] We agree with the submission by learned counsel of the appellant that the first respondent did not adduce any evidence to show that in the lease agreement between the second respondent company and PKNS there was a condition precedent to say that the second respondent company must have a Bumiputra shareholding of 51%. As the averment was made by the first respondent the burden was on the first respondent to prove that there was such a condition.

[23] Furthermore, even if there was such a condition, it had not been shown by the first respondent that such policy was in fact a public policy. No affidavit or document from the relevant government department was exhibited to support such averment. In this connection it is relevant to refer to the case of *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253. In that case the plaintiff are stock and share brokers and they are members of the Stock Exchange of Malaysia and Singapore, which is governed by its by-laws. The by-laws provide for a member firm to appoint a remisier whose name is required to be registered with the stock exchange. The defendant acted as remisier for the plaintiff although she was not registered with the stock exchange as such.

[24] One of the issues raised by the defendant in the Federal Court was that when the plaintiff entered into an agreement with the defendant to engage her as a remisier, without her being registered with the stock exchange, they were entering into an agreement which was void as being contrary to public policy. In his judgment Gill CJ (Malaya) said at pp 255 and 256:

> On the question of what is contrary to public policy, counsel for the appellant cited to us a number of English cases. I do not consider it necessary to deal with them, because in my judgment they do not help the appellant as would appear from the following passage from the judgment of Asquith LJ in *Monkland v Jack Barclay Limited* (3).

Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion — for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in *Fender v St John-Mildmay*(4).

The more recent cases of *Nagle v Feilden*(5) and *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*(6) do not carry the matter any further, even though Danckwerts LJ said in the former case that the law relating to public policy cannot remain immutable and must change with the passage of time.

Cheshire and Fifoot's Law of Contract (8th Ed) states at p 322 that the following two observations must be added upon the doctrine of public policy in the current law:

> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of law.
>
> Secondly, even though the contract is one which prima facie falls under one of the recognised heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case(4), should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ... In popular language ... the contract should be given the benefit of the doubt.

...

The arguments put forward by counsel for the respondent in contesting the appeal may be summarised as follows. The defendant did not plead that the contract was void as being opposed to public policy. For the court to take cognisance of illegality the transaction must be illegal on the face of it. Not being registered as a remisier is not contrary to public policy because the by-laws of the stock exchange are the by-laws of a private body which have no force of law. They are binding on the plaintiff but not on the defendant. If the plaintiff was dealing with an unregistered remisier they were committing a breach of by-law 97 of the Stock Exchange Rules which provided for a penalty. But their dealing with such a remisier did not make the contract illegal as being opposed to public policy.

I do not think there is any merit in the argument that illegality was not pleaded because a court is bound to take cognisance of it if it is of the opinion that the contract is void on the ground of being contrary to public policy. But I entirely agree with the rest of the arguments put forward by counsel for the respondent. It seems clear that the present contract does not fit into any of the traditional pigeon holes. It was on the basis of those arguments that the learned trial judge found that the contract between the plaintiffs and the defendant was not illegal. In my judgment the learned judge was quite right in taking that view.

[25] The cases cited to us by learned counsel for the first respondent to support the first respondent argument that the trust deed was void as being contrary to public policy were of no assistance to the first respondent as they did not deal with the issue in this case.

[26] Having carefully considered the submissions and the affidavit evidence we held that there was no merit in the first respondent's contention that the trust deed was void as being contrary to the public policy pursuant to s 24(e) of the Contracts Act 1950. There was no evidence to show that there was such a policy practised by the State Government of Selangor with regard to the land and secondly there was no evidence to show that the policy was in fact a public policy. More importantly it had not been shown that the trust deed was 'incontestably and on any view inimical to the public interest'. On the facts of the present case the trust deed, in our view, did not fall under any of the specific classes of contracts which have been ruled by authority to be contrary to the policy of the law.

[27] For the reasons given above the appellant's appeal was allowed with costs here and below. The first respondent was ordered to pay the costs for this appeal to the appellant which was fixed at RM5,000. The deposit was ordered to be refunded to the appellant.

Appeal allowed with costs here and below.

Reported by Mashrifah Ravendran